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No. 593

In the Supreme Court of the United States

OCTOBER TERM, 1942

DIRECT SALES COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court overruling petitioner's plea in abatement and demurrer to the indictment (R. 21–32) is reported at 40 F. Supp. 917, and its opinion overruling motions for a new trial and for arrest of judgment (R. 242–252) is reported at 44 F. Supp. 623. The opinion of the circuit court of appeals (R. 266–269) is reported at 131 F. (2d) 835.

JURISDICTION

The judgment of the circuit court of appeals was entered November 13, 1942 (R. 269–270).

The petition for a writ of certiorari was filed December 18, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether there was sufficient evidence to warrant submission of the question of petitioner's guilt to the jury.

2. Whether the trial court's instructions erroneously gave the jury the impression that if they convicted one of the alleged conspirators they also had to convict petitioner.

STATUTE INVOLVED

Section 37 of the Criminal Code (18 U. S. C. 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

STATEMENT

Petitioner, Dr. John V. Tate, George C. Johnson, Clyde A. Foster, and Reel B. Black were in-

dicted on May 26, 1941, in the District Court for the Western District of South Carolina in one count charging a conspiracy in violation of Section 37 of the Criminal Code (18 U. S. C. 88) (R. 1–10). The indictment alleged that from May 1, 1933, to June 10, 1940, at Calhoun Falls, South Carolina, the defendants conspired to defraud the United States of its revenues as provided by the Harrison Narcotic Act, as amended (I. R. C. § 3220), and to violate the provisions of that act interdicting the obtaining of drugs for unlawful purposes by means of official order forms, the trafficking in drugs without having registered and paid the taxes required by law, and the sale of drugs except in or from the original tax stamped packages and except in pursuance of official order forms (I. R. C. §§ 2553 (a), 2554 (a) and (g), 3224 (a)). It was further alleged that in accomplishing the purposes of the conspiracy petitioner, by means of circulars and catalogues, induced Dr. Tate to obtain from it by use of his official order forms large quantities of morphine sulphate at frequent intervals, knowing that the drugs were obtained by Dr. Tate for a purpose other than use and sale in the conduct of a lawful business in drugs or in the legitimate practice of his profession; that Dr. Tate sold the drugs in large quantities to the defendants Johnson, Foster, and Black, and other persons unknown to the grand jury, for the purposes of enabling such

persons to satisfy their addiction and to sell them to other persons; and that Johnson, Foster, and Black in turn sold the drugs to persons known and unknown to the grand jury (R. 2–3).

Petitioner filed a plea in abatement (R. 16–20) and a demurrer to the indictment (R. 20–21), which were overruled (R. 21–32). The defendants Johnson and Black pleaded guilty (R. 33). During the ensuing trial the defendant Foster suffered a heart attack and by consent of all counsel a mistrial was ordered as to him (R. 145, 242); the trial proceeded as to petitioner and Dr. Tate (*ibid.*). A motion for a directed verdict made at the close of the Government's case (R. 183) and renewed at the conclusion of all the evidence (see R. 223–224) was overruled (*ibid.*). Petitioner and Dr. Tate were found guilty (R. 10, 239) and petitioner's motions for a new trial (R. 240) and for arrest of judgment (R. 241) were denied (R. 242–252, 253). Petitioner was sentenced to pay a fine of $1,000 (R. 253, 254). On appeal by petitioner alone, its conviction was affirmed (R. 269–270).

The evidence pertaining to petitioner's part in the conspiracy shows as follows:

Petitioner is a New York corporation, having its principal place of business in Buffalo (R. 1, 33). It conducts a mail order drug business (R. 201) and is also a manufacturer and wholesale dealer in opium, its salts and derivatives (R. 1,

33). Pursuant to the provisions of the narcotic laws, petitioner has registered annually as a manufacturer and wholesaler of narcotic drugs (R. 1, 33, 201, 202). Petitioner does not solicit orders through salesmen (R. 201, 203; see also R. 114) but conducts its business through the mails (*ibid.*; see also R. 89). It depends upon its catalogues, which it sends out about every ten days, to place its products before its customers (R. 201, 214), of whom about 14,400 are doctors (R. 139, 188). Formerly petitioner's catalogues contained listings of narcotic drugs, but in 1940, after the Bureau of Narcotics had suggested that it discontinue its practice of offering a discount on these drugs, petitioner removed them from the general lists and substituted separate listings on colored sheets which it inserted in its catalogues (R. 200–201, 209, 214–215). Thereafter petitioner quoted prices with the discount already deducted (R. 215). Until the latter part of 1936 petitioner offered morphine sulphate in quantities of 500, 1,000, and 5,000 one-quarter grain and one-half grain tablets, but after that date it quoted the drug in lots of 500 and 1,000 tablets (R. 124, 126, 129; see p. 7, *infra*). Petitioner's prices for narcotic drugs were 30 to 40 per cent less than those charged by other drug houses (R. 89, 112, 113; see also R. 204). Its total annual business was between $300,000 and $350,000 (R. 202), of which the narcotic trade represented about 15 per cent (R. 203).

Dr. John V. Tate is a physician residing at Calhoun Falls, South Carolina (R. 84),[1] and was registered as such under the Harrison Act during the time alleged in the indictment (R. 85, 94). It was asserted in the indictment that none of the other individual defendants were registered under the Act (R. 2).[2] From 1933 until 1940, Dr. Tate received petitioner's catalogues regularly (R. 89). He admitted that he engaged in illicit traffic in morphine, the major portion of which he purchased from petitioner (R. 85, 90–91, 93; see also R. 49, 58, 60–61, 80–84, 84–87).

In August 1936, agent Bransky of the Narcotics Bureau (R. 115) advised petitioner that large quantities of morphine which were being sold by it were finding their way into illegitimate trade and he sought petitioner's cooperation to curb this practice. Petitioner told Bransky that it sold drugs only on order forms submitted by registrants. Bransky told petitioner, however, that experience showed that when a physician ordered half-grain tablets of morphine, it could be assumed that the drug was going into unlawful channels. He said also that the average physician would order only 200 to 400 quarter-grain tablets

[1] Calhoun Falls had a population of 1,832 according to the 1940 census. Sixteenth Census Reports on Population, Vol. I, p. 982.

[2] See also R. 90–91.

per year. (R. 120.)[3] Bransky gave petitioner a list of 204 registered physicians who had been convicted of violating the narcotic laws. Of this number, 55, or approximately 27 per cent, were petitioner's customers. (R. 121–122.) He pointed out to petitioner that other companies listed morphine in lots which did not exceed 100 quarter-grain and half-grain tablets, while petitioner offered lots of as much as 5,000 half-grain tablets (R. 124, 126). Petitioner then changed its listings to lots of 500 and 1,000 tablets (R. 124). Also, at the subsequent request of the Commissioner of Narcotics, petitioner agreed to limit the amount sold on any one order form to 1,000 half-grain tablets (R. 126, 159).

Though petitioner began selling morphine to Dr. Tate in 1934 (R. 169), the sales increased enormously during the period from November 1937 to January 1940. A tabulation of the sales during this latter period of approximately two years and two months (Govt. Ex. 12, R. 173)[4] shows that they increased from 1,000 half-grain tablets per month in the latter part of 1937, to 2,000 per month during most of 1938, and to 5,000 and 6,000

[3] There was expert testimony that the normal dosage of morphine is from one-eighth to one-fourth grain and that one-half grain is administered only in rare cases (R. 37, 38, 118, 162, 163).

[4] This exhibit is not printed in the Record, but is on file, with the other original exhibits, in the office of the Clerk of this Court.

monthly beginning in June 1939. The total purchases during the period covered by the tabulation amounted to 79,000 tablets, 19,000 of which were bought in the last two and one-half months (*ibid.*; see also R. 175). All of these sales were in 1,000 tablet lots (*ibid.*), and they increased in frequency to such an extent that Dr. Tate received shipments at intervals of as little as two and three days (*ibid.*). On one occasion two of his orders arrived at the local post office on the same day (R. 176).

The president of petitioner admitted that he knew Dr. Tate could use and dispense the morphine only in administering to his patients in the legitimate practice of his profession (R. 216-217), and that he was well aware that "doctors, who have been convicted of the improper use of drugs, have been convicted because of the fact that they are not using it in good faith" (R. 216). He admitted also that he knew that the purpose of the Narcotics Bureau's request to limit sales to 1,000 tablets per order was to reduce and eliminate diversion of the drug into unlawful channels (R. 209–210).

ARGUMENT

I

Petitioner's contention that the evidence does not support the verdict (Pet. 19–28) is based upon the premise that there was no proof that it had any knowledge of a conspiracy between Dr.

Tate and the other defendants and that under *United States* v. *Falcone*, 311 U. S. 205, the evidence as to the amount and frequency of its sales of morphine to Dr. Tate does not establish complicity in such a conspiracy.[5] "The verdict of a jury," however, "must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it" (*Glasser* v. *United States*, 315 U. S. 60, 80).

It is settled, of course, that no formal agreement is essential to the formation of a conspiracy; a mutual implied understanding is sufficient. The agreement is generally a matter of inference deduced from acts, conduct, and attendant circumstances. *Glasser* v. *United States*, *supra*; *United States* v. *Manton*, 107 F. (2d) 834, 839 (C. C. A. 2), certiorari denied, 309 U. S. 664; *Marino* v. *United States*, 91 F. (2d) 691, 694 (C. C. A. 9), certiorari denied *sub nom. Gallo* v. *United States*, 302 U. S. 764; *Marx* v. *United States*, 86 F. (2d) 245, 250 (C. C. A. 8); *Telman* v. *United States*, 67 F. (2d) 716, 717 (C. C. A. 10), certiorari denied, 292 U. S. 650; *Goode* v. *United States*, 58 F. (2d) 105, 107 (C. C. A. 8); *Stack* v. *United States*, 27 F. (2d) 16,

[5] *Eckert* v. *United States*, 7 F. (2d) 257 (C. C. A. 8), upon which petitioner also relies (Pet. 8, 22–23) as establishing a conflict of decisions, is not in point. That was a prosecution of a registered druggist for substantive offenses of selling drugs in violation of the Harrison Act and the court specifically noted (p. 257) that the indictment did not charge a conspiracy with the doctor upon whose prescriptions the drugs were sold.

(C. C. A. 9). It is clear, too, that personal acaintance of conspirators with each other is not cessary; it suffices if there is mutual underding and cooperation in furthering the purses of the unlawful enterprise. *Martin* v. *ited States*, 100 F. (2d) 490, 495–496 (C. C. A.), certiorari denied, 306 U. S. 649; *Booth* v. *ited States*, 57 F. (2d) 192, 197 (C. C. A. 10); *ewski* v. *United States*, 13 F. (2d) 599, 602 . C. A. 6), certiorari denied, 273 U. S. 735; *'en* v. *United States*, 4 F. (2d) 688, 691 (C. C. 7), certiorari denied *sub nom. Mullen* v. *United tes*, 267 U. S. 598.

Applying these principles here we think it is ar from the summary of the evidence, *supra*, 4–8, that petitioner's contention is untenable l that the *Falcone* decision, *supra*, is inapposite. In the first place, the evidence was amply suffiat to show a conspiracy between petitioner and . Tate whereby the doctor obtained from petiner by means of his official order forms enorus quantities of morphine for unlawful purses. Such use of order forms is specifically proited by the Harrison Act (I. R. C. § 2554 (g)). e indictment charged a conspiracy to violate s provision, among others (R. 2), and, so far petitioner was concerned, the trial centered and the question whether there was such an awful agreement between it and Dr. Tate (R.). The jury was justified in finding that there

was. Petitioner was bound to know that Dr. Tate was not dispensing the large quantities of morphine which he purchased from it in the legitimate practice of his profession. Dr. Tate practiced in a community of only 1,832 population. He purchased his supply in half-grain tablets in extraordinarily large amounts and at frequent intervals. Petitioner had been advised by agent Bransky in 1936 that in the light of his experience as a narcotic agent the average physician bought only from 200 to 400 quarter-grain tablets a year and that when a physician ordered half-grain tablets it was safe to assume that the drug was being used to supply addicts in violation of the narcotic laws (R. 120). Despite this knowledge, petitioner thereafter sold Dr. Tate 79,000 half-grain tablets in a period of a little over two years, and in the latter part of this period his purchases increased to as much as 6,000 tablets per month. As the court below said (R. 268), "That he [Dr. Tate] could legitimately use 6,000 one-half grain tablets or 12,000 normal doses [see n. 3, p. 7, *supra*] in one month was inconceivable. To use that amount legitimately he would have had to give 400 doses every day to his patients." Petitioner knew that Dr. Tate could not lawfully sell, barter or give away the morphine and that he could dispense it only in the legitimate practice of medicine. Moreover, petitioner affirmatively cooperated with Dr. Tate in the unlawful sale of drugs by means of

its catalogues which were mailed to him every ten days and by making morphine available to him in ever increasing quantities at discount prices. Though petitioner had been requested by the Narcotics Bureau in 1936 to reduce the maximum quantity it advertised for sale and also the amount sold on individual order forms, its compliance with these requests was merely formal, for it sold Dr. Tate as much morphine as he saw fit to order, requiring only that individual orders be limited to 1,000 tablets. (*Supra*, pp. 7–8.) Thus the evidence, with the inferences which may reasonably be drawn therefrom, presents a case where the supplier of a product subject to strict regulation because of its pernicious effects knowingly and actively joins with a distributor in the dissemination of the product for unlawful purposes, rather than a case where the supplier of a commodity not so regulated sells merely with knowledge or suspicion that it may be put to an unlawful use. The cooperation, manifested by this record, between petitioner and Dr. Tate clearly, we submit, spelled out a conspiracy between them.[*]

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[*] Petitioner's arguments (Pet. 20, 21, 24–25) that it complied with the provisions of the Harrison Act in selling morphine to Dr. Tate only upon official order forms and that it followed the suggestion of the Narcotics Bureau that it limit the amount of morphine sold on any one order form to 1,000 tablets, are unavailing, for, obviously, the legality *per se* of the sales may not be used as a shield for unlawful trafficking in drugs. Cf. *United States* v. *Behrman*, 258 U. S.

Furthermore, the case as to petitioner was submitted to the jury upon the theory that they could not convict it unless they found that there was a collusive agreement between it and Dr. Tate. Thus, the trial judge said in his charge that "before you could convict the wholesale druggist of conspiracy, you would have to find that he acted

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280, 288–289; *Webb* v. *United States*, 249 U. S. 96, 99–100; *Heller* v. *United States*, 104 F. (2d) 446, 447–448 (C. C. A. 4); *Friedman* v. *United States*, 260 Fed. 388, 390 (C. C. A. 6), certiorari denied, 250 U. S. 671. Petitioner also complains (Pet. 20) that the courts below misinterpreted its action in advising Dr. Tate on one occasion when he ordered more than 1,000 tablets that he would have to reorder the excess on a new order form (Govt. Ex. 4, R. 90). Whether this action is subject to the innocent explanation offered by petitioner or whether, in view of its course of dealings with Dr. Tate, the action was susceptible of an inference, unfavorable to petitioner, as indicated by the courts below (R. 244–245, 249, 269), was a question for the jury and, of course, on review of a denial of a motion for a directed verdict, the evidence must be viewed in the light most favorable to the Government. *Glasser* v. *United States*, 315 U. S. 60, 80. Petitioner further contends (Pet. 21) that the courts below should not have considered in their decisions sustaining the sufficiency of the evidence certain testimony relating to petitioner's listing of narcotic drugs on separate sheets inserted in its catalogues, because this practice was adopted, according to the testimony of petitioner's president (R. 200–201), in late 1940, subsequent to the period alleged in the indictment. It is true that both courts below adverted to this practice (R. 243, 267–268), but, even without such evidence, they were clearly correct in holding that the motion for a directed verdict was properly denied in view of the evidence which we have discussed at pp. 4–8, *supra*. Moreover, the jury could not have been misled as to the date of the adoption of the practice since they heard the testimony of petitioner's president and the trial court's

in collusion with the doctor as a result of a corrupt agreement or corrupt combination. Mere carelessness on the part of the wholesale druggist or lack of investigation on its part would not be sufficient. It must have sold the drugs knowing it was selling to the doctor at the time and that the purpose of the ordering of the morphine was to satisfy the craving of addicts or for him to sell unlawfully to other people and not in the course of his legitimate practice" (R. 231). [Italics supplied.] In addition, the judge twice specifically told the jury that they could not find petitioner guilty unless they also found Dr. Tate guilty (R. 228, 237–238).

In this view the decision in the *Falcone* case, 311 U. S. 205, is not applicable. The holding there was simply that "one who without more furnishes supplies to an illicit distiller is not guilty of conspiracy even though his sale may have furthered the object of a conspiracy to which the distiller was a party but of which the supplier had

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charge made no reference to the practice (see R. 226–238). Additionally, the indictment, showing the period of the conspiracy, was given to the jury, and they were advised that "The indictment is given you so you may know what the defendants are charged with. The indictment sets out and describes the alleged offense so that you can consider the evidence and the law and find if the defendants are guilty or not guilty, as alleged in the indictment. The indictment is the chart for you to go by" (R. 233; see also R. 227).

no knowledge" (pp. 210–211).[7] The *Falcone* case did not involve the question whether "conviction of conspiracy can rest on proof alone of knowingly supplying an illicit distiller, who is not conspiring with others" (p. 207). The Government conceded that "In such a case * * * the act of supplying or some other proof must import an agreement or concert of action between buyer and seller, which admittedly" was not present in the

[7] It is true that the trial judge also charged the jury on the theory of the *Falcone* decision, i. e., that if there was a conspiracy between Dr. Tate and others the mere fact that petitioner supplied morphine would not be sufficient to convict it of complicity in that conspiracy, but that the jury would have to find that petitioner "'had knowledge of such conspiracy' or there must have been a common design and purpose and guilty cooperation" (R. 234; compare 311 U. S. at 210). Although this theory would, in itself, have constituted a sufficient basis upon which to convict petitioner, it is evident that it could not have been taken by the jury as dispensing with the necessity of a finding by them of the existence of a conspiracy between petitioner and Dr. Tate, because, as we have shown (*supra*, pp. 13–14), the jury was told that they could not convict petitioner unless they found that such a conspiracy existed. It is therefore unnecessary to consider whether there was sufficient evidence to warrant a conviction under the rule of the *Falcone* case, there being adequate evidence to warrant submission to the jury of the question whether there was a conspiracy between petitioner and Dr. Tate.

The view that the evidence showed a separate, smaller conspiracy between petitioner and Dr. Tate does not result in a fatal variance for, obviously, petitioner was not prejudiced in its substantial rights. *Berger* v. *United States*, 295 U. S.

Falcone case (pp. 207–208). In the instant case, we submit, ample proof of a mutual understanding between petitioner and Dr. Tate is found in the systematic course of dealings between them over a period of many years—dealings, moreover, in a commodity the sale and distribution of which, as the district court pointed out (R. 248) and as petitioner well knew (see R. 216), is subject to strict regulation and control. Cf. *Deacon* v. *United States*, 124 F. (2d) 352, 355–356 (C. C. A. 1); *United States* v. *Pandolfi*, 110 F. (2d) 736 (C. C. A. 2), certiorari denied, 310 U. S. 651; *Heller* v. *United States*, 104 F. (2d) 446, 447–448 (C. C. A. 4); *Friedman* v. *United States*, 260 Fed. 388, 390–392 (C. C. A. 6), certiorari denied, 250 U. S. 671.[7]

II

Petitioner contends that the trial judge in his charge erroneously gave the jury the impression

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78, 81–83; *United States* v. *Manton*, 107 F. (2d) 834, 849–850 (C. C. A. 2), certiorari denied, 309 U. S. 664; *Marino* v. *United States*, 91 F. (2d) 691, 698–699 (C. C. A. 9), certiorari denied *sub nom. Gallo* v. *United States*, 302 U. S. 764; *Martin* v. *United States*, 100 F. (2d) 490, 494–495 (C. C. A. 10), certiorari denied, 306 U. S. 649; *Kopald-Quinn & Co.* v. *United States*, 101 F. (2d) 628, 633 (C. C. A. 5), certiorari denied *sub nom. Riesbaum* v. *United States*, 307 U. S. 628. As was pointed out by this Court in the *Berger* case, *supra*, the general rule that allegations and proof must correspond is designed merely to protect the accused against surprise and against a second prosecution for the same offense.

[7] Petitioner attempts (Pet. 28) to buttress its contention by reference to certain remarks made by the trial judge in

that if they convicted Dr. Tate they also had to convict petitioner (Pet. 29). As we have already pointed out, however, what the judge actually instructed the jury was that they could not convict petitioner unless they found that it conspired with Dr. Tate (*supra*, pp. 13–14). This was, of course, entirely proper in view of the theory on which the case as to petitioner was tried. In addition, the judge permitted the jury to convict Dr. Tate of a conspiracy between him and the defendants named in the indictment other than petitioner, even though they found no conspiracy between Dr. Tate and petitioner (R. 228). Petitioner made no objection to the submission of the case on these bases, but, on the contrary, the latter instruction was repeated at the request of petitioner's counsel just before the jury retired (R. 237–238).[9]

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overruling the motion for a directed verdict at the close of all the evidence indicating that he had considerable doubt as to the sufficiency of the evidence and that he thought the case presented a novel question which should be passed upon by the circuit court of appeals (R. 224). However, in his opinion (R. 242–252) overruling petitioner's motion for a new trial (R. 240–241), which was rendered after the judge had had an opportunity to examine the pertinent authorities, he expressed no doubt as to the sufficiency of the evidence to support the verdict. As is apparent from the opinion of the circuit court of appeals, the case is unique in that it involves a charge of conspiracy between a wholesale dealer in drugs and a practicing physician (R. 268); the applicable principles of the law of conspiracy are, however, well established.

[9] Petitioner's attack upon the charge was characterized by the court below as "not worthy of discussion" (R. 269).

CONCLUSION

The decision below is correct, and there is no real conflict of decisions or any question of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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